

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GINNA K. ROE

Claimant

VS.

MARLEY COOLING TOWER COMPANY

Respondent

AND

ACE AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,010,496

ORDER

Respondent and its insurance carrier (respondent) appealed the September 12, 2003 Preliminary Decision entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

Judge Foerschler ordered respondent to provide medical treatment for claimant's upper extremity complaints.

Respondent argues that claimant's request for preliminary benefits should be denied because claimant's injuries did not arise out of and in the course of her employment with respondent. In addition, respondent contends that claimant failed to give timely notice of her alleged work related accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant started working for respondent on March 17, 2003. Claimant alleges she injured her upper extremities by a series of repetitive trauma injuries through April 11, 2003, her last day of work.¹ Claimant was hired by respondent as a crate builder. Claimant described this job as more strenuous and hand intensive than her previous work. The crates were used to encase components of cooling systems for water towers. Claimant's job involved measuring the pieces of wood, cutting the wood using a radial arm saw and then securing the pieces in place with a pneumatic staple gun. A certain amount of force or pressure was required to operate the staple gun as well as forceful gripping or pressure to hold the wood in place. Also, when the staple gun's trigger was pulled it would cause a jolt to her hand. After the crate was built, claimant would bind it together with metal straps. This required claimant to use both hands on a ratchet tool in order to tighten the straps sufficiently. Another tool was then used to crimp a tab around the straps to secure them.

Claimant began noticing soreness and aching soon after commencing this job. By the middle of her second week, these symptoms were constant and interfered with her sleep at night. Claimant is right-handed. She noticed the symptoms first in her right hand but as she began compensating by using her left hand more, the symptoms increased on the left side. Claimant denies having problems with her hands or arms before commencing work for respondent.

The first person claimant discussed her upper extremity problems with at work was Dave Fiene. She considered him to be her supervisor. During a break claimant told Mr. Fiene that the pneumatic guns were starting to bother her fingers, hands and wrists. Claimant did not seek a referral for medical treatment at that time nor was any treatment offered. Likewise, there was no discussion about making an accident report either by claimant or Mr. Fiene. Mr. Fiene testified at the preliminary hearing that he did not recall claimant complaining to him about her hands. Furthermore, respondent contends that notice to Mr. Fiene would be ineffective in any event as he was a co-worker and not claimant's supervisor.

Respondent maintains that the May 5, 2003 letter from claimant's attorney was the first notice it received of an alleged accident. Claimant argues that if her conversation with Mr. Fiene is deemed insufficient to impart notice of accident, then the letter from her attorney should be considered timely notice as it was within 75 days of her last day of work and there was just cause for extending the time for giving notice beyond ten days.

¹ Claimant testified at the Sept. 11, 2003 preliminary hearing her last date of employment was April 13, 2003, but, respondent's Human Resource Manager, Mr. Donald Best testified and Respondent's Ex. D shows her last day worked was April 11, 2003. P.H. Trans. at 7, 20, 25, 29 and 33.

K.S.A. 44-520 requires a claimant provide notice of a work related accident to his or her employer within 10 days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim.² That same statute permits the reporting period to be extended when the employee has “just cause” for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether “just cause” exists are:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
- (3) The nature and history of claimant’s symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. Claimant acknowledged that she was told during employee orientation that she was to immediately report all accidents to her supervisor. But claimant did not understand her symptoms resulted from or constituted an accident. Furthermore, she thought her symptoms were merely temporary and would quickly resolve after she stopped working. The Board finds this evidence establishes just cause for failing to report the accident within the 10-day period contained in K.S.A. 44-520. Therefore, the time for giving respondent notice of accident should be extended to 75 days. Accordingly, the May 5, 2003 letter from claimant's counsel satisfies the statutory notice requirement.

Claimant last worked for respondent on April 11, 2003. She first sought medical treatment on May 5, 2003, from her family physician, Dr. Sherard. There appears to be no dispute but that claimant has bilateral carpal tunnel syndrome. The physicians agree on this diagnosis. They do not agree, however, as to the cause of claimant's condition.

Dr. Brian J. Divelbiss examined claimant on July 18, 2003. He opined that claimant's short term of employment with respondent was likely not the “primary cause” of her condition.

Dr. Michael Poppa, who saw claimant on August 7, 2003, opined that her condition was work related. However, his opinion is somewhat suspect due to what appears to be

² See e.g., *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

an incorrect assumption concerning the amount of time claimant worked per day for respondent.

Based upon the record compiled to date the Board finds that it is more probable than not that claimant's bilateral upper extremity problems are work related.

Claimant's testimony, which the Board finds credible, is that she had no such symptoms before she commenced work for respondent and that those symptoms started soon after she started work. Her work was more physical and hand intensive than what she was accustomed to. It required forceful gripping and pushing with her hands and arms. Although claimant obviously made use of her hands and arms away from work, including doing house work and playing video games, she did not perform those other tasks at the level of exertion nor did they require as much forceful use of her upper extremities nor for an extended period as she did at work. The symptoms started during her second week of employment which is also consistent with the symptoms being work related. Claimant may have been predisposed to this condition, but the Board finds the work, at a minimum, accelerated its onset.

Therefore, the Board finds the claimant has established that it is more probable than not that she suffered personal injury by accident arising out of and in the course of her employment with respondent and that she gave timely notice of her accidental injury.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Preliminary Decision by Administrative Law Judge Robert H. Foerschler dated September 12, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Randall W. Schroer, Attorney for Respondent and Ace American Ins. Co.
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director